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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 392

STUART DAGGETT, SR., AND AMERICAN TRUST COMPANY, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ESTELLE P. CLARK, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 21-26) is reported in 44 B. T. A. 32. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 110-133) is reported in 128 F. 2d 568.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 28, 1942, and the order denying petition for rehearing on July 15, 1942 (R.

133-134). The petition for writ of certiorari was filed on September 11, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent's divorced husband, also deceased, created a trust prior to their divorce in order to satisfy her claim for support and for dower. The question is whether she was liable, under the provisions of Section 162 of the Revenue Act of 1936, for income tax on amounts received by her from the trust after her former husband's death.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be

included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

STATEMENT

The facts were stipulated and were summarized by the Board of Tax Appeals as follows (R. 22-23):

A trust was created in 1906 by the decedent's former husband in connection with an agreement which the parties made in contemplation of their separation, and in consideration of a release by the decedent of all claims against her husband and his estate for her support and that of their child during the latter's minority. The husband agreed "at all times to keep and maintain in the hands of the Trustee good, valid and marketable securities of a market value which shall at no time bear and yield an annual income of less than Twenty Five Thousand Dollars (\$25,000)." The trustee was to pay this amount of income to the wife annually for life (or after her remarriage, \$15,000), and to pay any excess income to the husband. In case of a deficiency in trust income, the husband agreed to pay the difference to the trustee. The wife was given the right to dispose by will of trust corpus of \$150,000; upon her death, remaining corpus was to re-

vert to the husband. Husband and wife mutually released curtesy and dower rights in realty owned by each (R. 22).

On October 1, 1906, the decedent procured an absolute divorce in South Dakota. After adverting to the fact that suitable provision had been made for her support and the daughter, the court decreed "that no allowance be made the plaintiff for alimony, support or maintenance, and that in this respect this decree shall be final and not subject to future modification or amendment" (R. 23).

The trust was carried out; the decedent never remarried, and prior to 1930 the daughter attained her majority. The husband died on December 9, 1935. The decedent died on September 19, 1937, a resident of California since 1930. She disposed by will of \$150,000 of the trust corpus, and such appointment is now the subject of litigation. During the husband's life, he made good deficiencies in trust income when it was less than \$25,000. For the fiscal year of the trust ending July 7, 1936,¹ there was a deficiency of \$4,040.06, which the decedent's executors have recovered from the trustee by a judgment of the Supreme Court of New York, entered June 23, 1937, in which it was (R. 23):

"Ordered, Adjudged and Decreed that the rights and obligations of the respective

¹ The Board's opinion erroneously gives the date as July 7, 1937. See Stipulation R. 41. It is shown elsewhere that this deficiency occurred prior to the beginning of the calendar year 1936. See R. 72, 92.

parties to the agreement of February 28, 1906, were intended by the parties to be in lieu of and in substitution for any and all obligations resting upon said James F. A. Clark for the maintenance or support of Estelle P. Clark; * * *

During the husband's life, amounts distributed to the decedent out of income of the trust were excluded from her taxable income; but the Commissioner has now held that upon his death she became the sole beneficiary of the trust and liable under Section 162 (b), Revenue Act of 1936, for tax upon the distributable income (R. 23-24).

The Board approved the Commissioner's determination and found that the decedent owed deficiencies in income tax in the amounts of \$2,365.06 for 1936 and \$1,149.14 for the portion of 1937 expiring before her death on September 19, 1937 (R. 26.)

ARGUMENT

The decision below is in accord with *Thomas v. Commissioner*, 100 F. (2d) 408 (C. C. A. 2d), and there are no decisions to the contrary.

Section 162 (b) of the Revenue Act of 1936, *supra*, requires a beneficiary to whom trust income is currently distributable, as in the instant case, to include such income in computing such beneficiary's net income for tax purposes. Under this section Mrs. Clark would be liable for tax on the trust income distributed to her as beneficiary of the trust created by her husband prior to their divorce. Cf.

Helvering v. Butterworth, 290 U. S. 365. However, it is contended that this is a case for application of an exception to the general rule, namely, that where trust income is payable to a divorced wife as alimony under the divorce decree, it is taxable to the divorced husband. *Douglas v. Willcuts*, 296 U. S. 1; *Helvering v. Leonard*, 310 U. S. 80; *Helvering v. Fitch*, 309 U. S. 149. And it is pointed out that the husband did pay tax on this trust income during his lifetime. The contention is without merit here because this case involves the period *after* the husband's death. The obligation to pay alimony terminated at his death, with the consequence that the trust payments thereafter were not in discharge of any continuing obligation and must therefore be included in the income of the recipient in the usual course.

In none of the income tax cases cited by petitioners had the husband died. Moreover, while in several of these cases the trust income was made payable to the divorced wife for life, there is no suggestion in any of the cases indicating that the wife's exemption from tax should continue after the husband's death.

Pearce v. Commissioner, 315 U. S. 543, did not involve a situation where the husband had died. However, the decision makes it clear that the showing which a divorced wife must make to avoid the tax bears upon the question whether the personal obligation of her husband is being satisfied by the

payments made to her. The death of the husband precludes such a showing here.

CONCLUSION

There is no conflict, and the decision of the court below is in accord with established principles. The petition should be denied.

Respectfully submitted.

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OCTOBER 1942.